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8
9 IN THE UNITED STATES DISTRICT COURT
10
11 EASTERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JOHNNIE EARL ROSS JR., and
VIN WHEALEN GAINES JR.,

16 Defendants.

CASE NO. 2:20-CR-0208-JAM

STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
FINDINGS AND ORDER

DATE: March 9, 2021

TIME: 9:30 a.m.

COURT: Hon. John A. Mendez

17
18 This case is set for a status conference on March 9, 2021. By this stipulation, the parties request
19 a continuance of the status conference to May 4, 2021, and to exclude time under Local Code T4.

20 On May 13, 2020, this Court issued General Order 618, which suspends all jury trials in the
21 Eastern District of California “until further notice.” Further, pursuant to General Order 611, this Court’s
22 declaration of judicial emergency under 18 U.S.C. § 3174, and the Ninth Circuit Judicial Council’s
23 Order of April 16, 2020 continuing this Court’s judicial emergency, this Court has allowed district
24 judges to continue all criminal matters to a date after May 2, 2021.¹ This and previous General Orders,
25 as well as the declarations of judicial emergency, were entered to address public health concerns related
26 to COVID-19.

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28 ¹ A judge “may order case-by-case exceptions” at the discretion of that judge “or upon the
request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order
will impact court staff and operations.” General Order 618, ¶ 7 (E.D. Cal. May 13, 2020).

1 Although the General Orders and declarations of emergency address the district-wide health
2 concern, the Supreme Court has emphasized that the Speedy Trial Act's end-of-justice provision
3 "counteract[s] substantive openendedness with procedural strictness," "demand[ing] on-the-record
4 findings" in a particular case. *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-
5 record findings, there can be no exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such
6 failure cannot be harmless. *Id.* at 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153
7 (9th Cir. 2000) (explaining that a judge ordering an ends-of-justice continuance must set forth explicit
8 findings on the record "either orally or in writing").

9 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory
10 and inexcusable—General Orders 611, 612, 617, and 618 and the subsequent declaration of judicial
11 emergency require specific supplementation. Ends-of-justice continuances are excludable only if "the
12 judge granted such continuance on the basis of his findings that the ends of justice served by taking such
13 action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C.
14 § 3161(h)(7)(A). Moreover, no such period is excludable unless "the court sets forth, in the record of
15 the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of
16 such continuance outweigh the best interests of the public and the defendant in a speedy trial." *Id.*

17 The General Orders and declaration of judicial emergency exclude delay in the "ends of justice."
18 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address
19 continuances stemming from pandemics, natural disasters, or other emergencies, this Court has
20 discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-
21 week ends-of-justice continuance following Mt. St. Helens' eruption. *Furlow v. United States*, 644 F.2d
22 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed.
23 *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to
24 exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency).
25 The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated
26 by the statutory rules.

In light of the societal context created by the foregoing, this Court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7) (Local Code T4).²

STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant's counsel of record, hereby stipulate as follows:

1. By previous order, this matter was set for status on March 9, 2021.
2. By this stipulation, defendant now moves to continue the status conference until May 4, 2021, and to exclude time between March 9, 2021, and May 4, 2021, under 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4].
3. The parties agree and stipulate, and request that the Court find the following:
 - a) The government has represented that the discovery associated with this case includes approximately 654 pages of investigative reports and other documents, as well as numerous video and audio recordings and other materials. All of this discovery has been produced directly to counsel and/ or made available to defense counsel for inspection.
 - b) The indictment in this case was returned on November 5, 2020.
 - c) Defendant Johnnie Earl Ross Jr. made his initial appearance in this case on February 4, 2021, and attorney Christopher Cosca was appointed to represent him.
 - d) Counsel for defendants need additional time to review the discovery, conduct investigation, confer with their clients regarding defense strategy, and to otherwise prepare for trial.
 - e) Counsel for defendants believe that failure to grant the above-requested continuance would deny them the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.
 - f) The government does not object to the continuance.

² The parties note that General Order 612 acknowledges that a district judge may make “additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D. Cal. March 18, 2020).

1 g) In addition, because of the public health concerns cited by the General Orders and
2 declarations of judicial emergency, and presented by the evolving COVID-19 pandemic, an
3 ends-of-justice delay is particularly apt in this case.

4 h) Based on the above-stated findings, the ends of justice served by continuing the
5 case as requested outweigh the interest of the public and the defendant in a trial within the
6 original date prescribed by the Speedy Trial Act.

7 i) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
8 et seq., within which trial must commence, the time period of March 9, 2021 to May 4, 2021,
9 inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4]
10 because it results from a continuance granted by the Court at defendant's request on the basis of
11 the Court's finding that the ends of justice served by taking such action outweigh the best interest
12 of the public and the defendant in a speedy trial.

13 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the
14 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial
15 must commence.

16 IT IS SO STIPULATED.

18 Dated: March 4, 2021

PHILLIP A. TALBERT
Acting United States Attorney

21 _____
/s/ DAVID W. SPENCER
DAVID W. SPENCER
Assistant United States Attorney

23 Dated: March 4, 2021

24 _____
/s/ CHRISTOPHER COSCA
CHRISTOPHER COSCA
Counsel for Defendant
JOHNNIE EARL ROSS JR.

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2 Dated: March 4, 2021
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/s/ JEROME PRICE
JEROME PRICE
Counsel for Defendant
VIN WHEALAN GAINES JR.

FINDINGS AND ORDER

10 IT IS SO FOUND AND ORDERED this 5th day of March, 2021.
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12 /s/ John A. Mendez
13 THE HONORABLE JOHN A. MENDEZ
14 UNITED STATES DISTRICT COURT JUDGE
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